BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GRETCHEN NEWBERRY	)	
Claimant	)	
	)	
VS.	)	
	)	
ASSOCIATES IN WOMEN'S HEALTH	)	
Respondent	)	Docket No. 1,031,033
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the January 18, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Citing *Rinke*,[1] the Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment with respondent when she fell on respondent's premises. Accordingly, the ALJ ordered that Dr. John Osland be authorized as claimant's authorized treating physician, ordered outstanding medical paid as authorized, and ordered temporary total disability benefits paid if claimant is taken off work.

Respondent requests review of the ALJ's finding that claimant was injured out of and in the course of her employment with respondent. Respondent argues that claimant was not on respondent's premises at the time of the accident since the steps where claimant fell were in a common area of the building. Respondent contends that claimant's risk for injury was no greater than that of respondent's customers or customers of the other tenant in the building. Respondent also argues the "special hazard" exception does not apply because claimant was not injured while using the only available route to reach the

[1] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

landing in front of the building, her route did not involve a special risk or hazard, and the route was not one used by the public exclusively in dealing with respondent.

Claimant contends she was required to park in a specific row in the parking lot surrounding respondent's premises and to enter the building at the main entrance. She argues that, therefore, she was on respondent's premises at the time she fell on the steps and her accident fell into an exception to the "going and coming" rule.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed with respondent as a debt collector. On July 27, 2006, she was returning to work from lunch. It was raining at the time, but she testified she was not running. As she was coming up some steps to the landing in front of the building, she fell and injured her right knee. She said the steps were carpeted and there was a puddle of water where she slipped. Claimant stated that although she was returning to work from lunch when she fell, she considered herself in respondent's control at the time because she was following the route prescribed by respondent.

Respondent's business was located in a building it shared with another business, Cypress Women's Imaging (Cypress). The building is adjacent to a parking lot where employees of both businesses, as well as customers of both businesses, park. Claimant testified that respondent's business office employees were told to park in a row farther from the building than customers would park. Most employees of Cypress parked two rows over from the row respondent's employees parked, although one or two Cypress employees parked by respondent's employees.

Claimant testified she was required to enter the building at the main entrance, which is the same entrance that is used for both customers of respondent and of Cypress. There is another entrance to the building, but it was locked. Since claimant reported to work at 8:00 a.m., she was not given a key to the other entrance. In order to get to the main entrance, she could either climb two steps to get to a landing outside the main entrance, or she could walk up a ramp to the landing.

After claimant fell, she reported the accident immediately to her supervisor, and her supervisor told her to go to the Wichita Clinic or to her primary care physician for treatment. Claimant went to the Wichita Clinic. She believes her treatment was authorized by respondent.

Jo Marsh, chief executive officer of respondent, testified that the building where respondent is located is owned by Olive Grove. She stated that upon entering the building from the main entrance, there was not a separate entrance to Cypress or respondent;

there were separate reception desks. Ms. Marsh said the main entrance, where claimant's fall occurred, was considered the front door. That door was unlocked at 7:45 a.m. The back door is kept locked for security reasons, and only employees who started their shift before 7:45 a.m. had a key to the back door.

Ms. Marsh testified that Olive Grove is responsible for maintaining the building. There could be occasions where a dangerous condition would occur when respondent would take care of the problem, such as spreading sand or salt on ice. In that situation, Olive Grove would be contacted if more needed to be done. Ms. Marsh agreed that the employees of Cypress also could do emergency maintenance in and around the building.

Ms. Marsh agreed with claimant that respondent's employees are asked to park in a row that faces to the south, if spots are available. There are no designated spots for employees. Respondent does not pay an additional fee for employee parking; parking for employees and customers is covered in the lease with Olive Grove.

The "going and coming" rule contained in K.S.A. 2006 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2006 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In *Thompson*,[3] the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to

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[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[3] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

> which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2006 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

Claimant relies on the recent Kansas Supreme Court decision in *Rinke*[6] and argues that the going and coming rule does not apply because claimant was directed by respondent where she could park and which entrance to use. However, except for the fact that the parking lot was owned by respondent's landlord, the facts in this case are more consistent with *Thompson* than with *Rinke*. In *Rinke*, the employer exercised greater control of the parking lot where Rinke slipped and fell. Also in this case, claimant fell on the steps leading to the main entrance of the building, not in the portion of the parking lot where she was directed to park. Claimant fell in a common area used not only by employees and customers of respondent, but of the other tenant as well. In addition, unlike in *Rinke*, neither the building nor the parking lot in this case are used almost exclusively by respondent's employees. Hence, the degree of control by respondent which was found to exist in *Rinke* has not been shown to be present in this case. This Board Member finds that the fall occurred in a common area over which respondent did not exercise sufficient control to treat as its premises.

Claimant also argues, in the alternative, that "requiring Ms. Newberry to park in a distance [*sic*] position and traverse the entire lot during a heavy rainstorm subjected her to a 'special risk or hazard' which would also cause the 'going and coming' rule not to apply."[7] This argument is without merit. Claimant's fall occurred on the steps at the entrance of the building, not in a distant parking lot. She was placed at no greater risk than was the public.

Had claimant been injured in a designated area of the parking lot leased to respondent, then those facts may have led to a different result. Under these facts, however, claimant has failed to prove an applicable exception to the going and coming

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[4] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[5] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[6] *Supra* at note 1.

[7] Claimant's brief at 6 (filed Feb. 20, 2007).

rule. Accordingly, her accident did not arise out of and in the course of her employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 18, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2007.

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BOARD MEMBER

c: Mel L. Gregory, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[8] K.S.A. 44-534a.

[9] K.S.A. 2006 Supp. 44-555c(k).